

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

ROBERT R. BENNIE JR.,	)	
individually and on behalf of Bob	)	
Bennie Wealth Management, Inc.,	)	
	)	
Plaintiff,	)	4:11CV3089
	)	
v.	)	
	)	
JOHN MUNN, in his official and	)	<b>MEMORANDUM</b>
individual capacity, JACK E.	)	<b>AND ORDER</b>
HERSTEIN, in his official and	)	
individual capacity, RODNEY R.	)	
GRIESS, in his official and individual	)	
capacity, and JACKIE L. WALTER,	)	
in her official and individual capacity,	)	
	)	
Defendants.	)	
	)	

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Pending before the court are Defendants' Motion for Summary Judgment (Filing [154](#)); Defendants' Motion to Seal Pursuant to Protective Order (Filing [158](#)); Plaintiff's Motion to Seal Pursuant to Protective Order (Filing [162](#)); and Plaintiff's Motion to Strike Brief (Filing [167](#)).

**Motion for Summary Judgment**

Defendants move for summary judgment on the grounds that each defendant in their individual capacity is entitled to qualified immunity; Defendants took no adverse action against Plaintiff in retaliation for his exercise of his First Amendment rights; none of Defendants' actions would chill a person of ordinary firmness from exercising his or her First Amendment rights; a retaliatory motive was not a

substantial factor in Defendants' actions; and Defendants would have taken the same actions regardless of Plaintiff engaging in protected activity. (Filing [154](#).)

With regard to the portion of Defendants' Motion for Summary Judgment based on qualified immunity, I note that after the parties filed their summary-judgment materials, the Order on Final Pretrial Conference (Filing [173](#)) was filed, which stated: "Because plaintiff's only remaining claims are for declaratory and injunctive relief, plaintiff's claims against the defendants are official capacity claims. All individual capacity claims against all defendants have been abandoned by the plaintiff and are dismissed with prejudice." (Filing [173](#) at CM/ECF p. 3.) Because "[q]ualified immunity only applies to claims against public officials in their individual capacities," *Serna v. Goodno*, 567 F.3d 944, 952 (2009) (citing *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985)), and because Plaintiff has abandoned all individual-capacity claims, the portion of the Motion for Summary Judgment based on qualified immunity shall be denied as moot.

As to the remainder of the Motion for Summary Judgment, suffice it to state that in the parties' almost 3,000 pages of summary-judgment materials (Filings [154](#), [155](#), [156](#), [157](#), [159](#), [160](#), [161](#), [163](#), [164](#), [166](#), [171](#)), there are genuine issues of material fact precluding the entry of summary judgment regarding the nature of Defendants' actions taken against Plaintiff and the motivating factor behind those actions, as well as credibility issues. Therefore, the remainder of Defendants' Motion for Summary Judgment (Filing [154](#)) shall be denied as well.

### **Other Motions**

Defendants' Motion to Seal Pursuant to Protective Order (Filing [158](#)), Plaintiff's Motion to Seal Pursuant to Protective Order (Filing [162](#)), and Plaintiff's Motion to Strike Brief (Filing [167](#)) are all unopposed and shall be granted.

IT IS ORDERED:

1. All individual-capacity claims against all defendants are dismissed with prejudice, as Plaintiff has abandoned such claims.
2. From this date forward, the case caption shall reflect that all defendants are sued in their official capacities only.
3. Paragraphs (C) 2-5 of the Order on Final Pretrial Conference (Filing [173](#) at CM/ECF p. 3), which lists as a controverted issue whether Defendants are entitled to qualified immunity, shall no longer be considered a “controverted and unresolved issue” for resolution at the non-jury trial in this matter.
4. Defendants’ Motion for Summary Judgment (Filing [154](#)) based on qualified immunity is denied as moot, and the remainder of the motion is denied due to genuine issues of material fact precluding the entry of summary judgment.
5. The unopposed Plaintiff’s Motion to Seal Pursuant to Protective Order (Filing [162](#)) is granted, and the Clerk of Court shall seal Exhibits 158, 159, 160, 161, 172, 173, 174, 175, 177, and 178 to Plaintiff’s Index of Evidence (Filings [163](#) & [164](#)) in opposition to Defendants’ Motion for Summary Judgment.
6. The unopposed Defendants’ Motion to Seal Pursuant to Protective Order (Filing [158](#)) is granted, and the Clerk of Court shall seal Exhibits 15, 17, 41, 55, 56, 57, 58, and 59 to Defendants’ Index of Evidence (Filing [159](#)) in Support of Defendants’ Motion for Summary Judgment.
7. The unopposed Plaintiff’s Motion to Strike Brief (Filing [167](#)) is granted, and Plaintiff’s first-filed Brief in Opposition to Defendants’ Motion for Summary Judgment (Filing [165](#)) shall be stricken.

DATED this 4<sup>th</sup> day of February, 2014.

BY THE COURT:

*Richard G. Kopf*

Senior United States District Judge

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